

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

OCT 28 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0389
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LUIS MARTIN SANDOVAL,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20034085

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson

Tucson
Attorneys for Appellee

Dicampli, Elsberry & Hunley, LLC
By Anne Elsberry

Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial in absentia, Luis Sandoval was convicted of conspiracy to transport and transporting marijuana for sale. The trial court sentenced him to a presumptive term of 11.5 years on the conspiracy charge and to a concurrent, mitigated term of 10.5 years on the transportation charge. On appeal, he contends the trial court erred in denying his motion to disclose the identity of a confidential informant. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We review the trial court's denial of the motion to disclose for an abuse of discretion and consider the facts in the light most favorable to sustaining the convictions. *See State v. Tuell*, 112 Ariz. 340, 342, 541 P.2d 1142, 1144 (1975); *State v. Robles*, 182 Ariz. 268, 270, 895 P.2d 1031, 1033 (App. 1995).

¶3 In November 2003, a confidential informant accompanied Sandoval to a fast-food restaurant to introduce him to U.S. Immigration and Customs Enforcement Special Agent Patrick McKenna, who was posing as a broker for a marijuana purchaser. Sandoval and McKenna did not attempt to do business at that time but arranged to meet later the same day. During the second meeting, at which the informant was not present, the two negotiated for a sale of marijuana that was to take place the next day. The sale did not occur, and McKenna told Sandoval he would purchase marijuana from someone else. Sandoval offered to contact another seller and to call McKenna if he could secure more marijuana. That night, Sandoval telephoned McKenna to say he had found another supplier, but McKenna declined

because the amount of marijuana available was only half the amount McKenna had said he wanted to purchase. McKenna claimed his “people had already left town but they were returning in . . . a couple weeks,” and Sandoval told McKenna he would stay in contact.

¶4 Sandoval contacted McKenna approximately two weeks later, and the two arranged a sale to take place at a Tucson motel. When they met to complete the transaction, McKenna provided a truck for Sandoval and another man to use as a “load vehicle.” Sandoval and his companion left in the truck, loaded it with marijuana, and returned about fifteen minutes later. When McKenna verified the marijuana was in the truck, he gave a signal to other law enforcement officers in the area to take everyone into custody.

¶5 Sandoval filed a pretrial motion to disclose the identity of the confidential informant or, in the alternative, to dismiss the charges. The trial court denied the motion. Sandoval absconded before trial and was found guilty in absentia in 2005. He was sentenced in 2007 after being taken into custody, and this appeal followed.

Discussion

¶6 Sandoval’s sole argument on appeal is that the trial court erred when it denied his motion for disclosure of the confidential informant’s identity. A defendant bears the burden of demonstrating that a confidential informant is likely to have evidence bearing on the merits of the case and that nondisclosure of the informant’s identity would deprive the defendant of a fair trial. *State ex rel. Berger v. Superior Court*, 106 Ariz. 470, 474, 478 P.2d 94, 98 (1970); *State v. Castro*, 13 Ariz. App. 240, 242, 475 P.2d 725, 727 (1970).

¶7 Sandoval argues that, by refusing to order the state to disclose the identity of the informant, the trial court “denied [him] any opportunity to either [sic] discover the method or means by which Agent McKenna was introduced to [him].” He maintains this hampered his ability to present the affirmative defense of entrapment, thus depriving him of a fair trial. To show entrapment, however, Sandoval was required to introduce “patently clear” evidence that he was an otherwise innocent person who had been induced to commit criminal acts. *See State v. Gessler*, 142 Ariz. 379, 382, 690 P.2d 98, 101 (App. 1984). Sandoval contends “further evidence from the confidential informant . . . would have shown whether he was a willing participant . . . or had somehow been coerced.” But he presented no evidence whatsoever to support this assertion.

¶8 We note this case presents an issue identical to the one we addressed in *State v. Robles*, 182 Ariz. 268, 895 P.2d 1031 (App. 1995), a case Sandoval has not discussed or even acknowledged in his brief. In *Robles*, a confidential informant introduced an undercover police officer posing as a buyer’s middleman to Robles, an intermediary for a marijuana supplier. *Id.* at 270, 895 P.2d at 1033. The informant was present only for the initial introduction and did not participate in negotiating or effecting the actual sale of marijuana. *Id.* Before trial, Robles unsuccessfully sought disclosure of the informant’s identity in order to present an entrapment defense, arguing the informant had coerced him to participate in the sale. *Id.* at 271, 895 P.2d at 1034. This court affirmed the trial court’s refusal to order disclosure, saying:

[E]vidence sufficient to support a claim for [such] disclosure or to counter it includes such things as “sworn affidavits, stipulated facts, depositions, and oral testimony.” As in [*State v.*] *Grounds*, [128 Ariz. 14, 15, 623 P.2d 803, 804 (1981),] only counsel’s argument was presented in support of appellant’s requested disclosure, which the court in *Grounds* found insufficient, as do we.

Robles, 182 Ariz. at 271, 895 P.2d at 1034. As in *Robles* and *Grounds*, Sandoval’s only justification for this disclosure request was his counsel’s speculative argument that useful information might be obtained from the informant. This was clearly insufficient. *See id.*; *see also United States v. Sai Keung Wong*, 886 F.2d 252, 256 (9th Cir. 1989) (“mere suspicion” insufficient to justify disclosure of confidential informant). Accordingly, we cannot say the trial court abused its discretion in denying Sandoval’s motion for disclosure.

¶9 For the foregoing reasons, Sandoval’s convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge